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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 330

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM, Individually and in Their Representative Capacity,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN KLOTSCHE, Individually and as members of a Board of Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, a Wisconsin Corporation,

Respondents.

On a Writ of Certiorari to the
Supreme Court of the State of Wisconsin

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Wisconsin Supreme Court (R. 235-237) is reported at 257 Wis. 53. The opinion of the circuit court (R. 101-106) is not reported.

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered May 2, 1950. (R. 234) A motion for rehearing

was denied on June 30, 1950. (R. 239) The jurisdiction of this Court is invoked under Section 1257(3) of Title 28, U.S.C.

QUESTIONS PRESENTED

1. Whether a State may by statute prohibit strikes which threaten to interrupt an essential public utility service.

2. Whether a State, having prohibited strikes in such cases, can require that labor disputes be settled by arbitration when they have reached an impasse.

STATE STATUTES INVOLVED

The State statutes involved are printed in Appendix A to the petitioner's brief.

STATEMENT OF CASE

In addition to the facts stated in petitioner's brief, we add the following: After the case below was presented by briefs and oral argument to the Wisconsin Supreme Court, the Union and the Company entered into a labor contract on April 7, 1950, effective as of April 1, 1950, said contract not to expire until September 30, 1951. (Appendix A, of this Respondent's Brief in Opposition to Petition for a Writ of Certiorari.)

Petitioner in the companion case (No. 329) in its statement of facts (p. 9) makes the statement that the employer's final offer during the conciliation was less favorable to the union than any offer it had previously made (R. 143). This statement was merely an allegation in defendant's (petitioner's) answer, and was not found as a fact.

The Union gave only a few hours notice to the Company and the public that they were going to go out on strike. (R. 132, Case No. 329).

The members of the union did in fact go out on strike on the morning of January 5, 1949. At 9:00 A.M. on that day all of the Company's vehicles were off the streets. (R. 136, Case No. 329).

SUMMARY OF ARGUMENT

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ARGUMENT

I.

THE PRINCIPAL ISSUES PRESENTED BY THE PETITION ARE NOW MOOT

In petitioner's brief under the title *"Question Presented,"* the principal question set forth is as follows:

> "Whether a State may by statute require employees of a 'public utility' employer to submit disputes regarding contract terms to arbitration and to be bound by the results of such arbitration for a period of one year, the same statute making it a criminal offense for such employes to strike."

We submit that this question has become moot, and therefore is no longer open to adjudication. The nature of this suit was an action to review and set aside an order of the arbitration board. Section 111.59 of the Wisconsin Statutes provides that the order of the arbitration board shall "continue effective for one year from that date (the date filed with the Clerk of Circuit Court), but such order may be changed by the mutual consent or agreement of the parties." The order of the arbitration board was issued on April 9, 1949, and was filed with the Clerk of the Circuit Court for Milwaukee County on April 11, 1949. (R. 222) By virtue of Section 111.59 the order became ineffective on April 11, 1950, unless changed by

agreement of the parties. The parties entered into a contract on April 7, 1950, to run for 18 months (Appendix A, Respondent's Brief in Opposition to Petition for Writ of Certiorari), which by operation of law rendered the arbitration order ineffectual. Thus there is no longer any occasion to challenge the power of the state to require public utility employers and employes to submit to arbitration. No justiciable controversy now exists in which petitioners can challenge the state's power. This Court has no jurisdiction to pass on a federal question that is moot. *Kimball v. Kimball,* 174 U.S. 158; *Little v. Bowers,* 134 U.S. 547.

The issue in the companion case is likewise moot. The arbitration order is no longer in effect. The parties voluntarily entered into a contract on April 7, 1950, which will not expire until September 30, 1951. (Appendix A). The parties are no longer proceeding under the Wisconsin law in question. They are now carrying on under a labor contract conclusively presumed to be acceptable to both. Petitioner is no longer in a position to attack the injunction.

II.

THE WISCONSIN ACT IS NOT IN CONFLICT WITH THE TAFT-HARTLEY ACT

Petitioner's principal contention is that Chapter 414, Wisconsin Laws of 1947, is invalid because of alleged conflict with the Labor Management Relations Act, 61 Stats. 136, U.S.C.A. §§141-197, more commonly referred to as the Taft-Hartley Act. Petitioner more particularly urges that the prohibition of the right to strike by public utility employes and the substitution therefor of the compulsory arbitration procedure (if conciliation should

prove to be futile) is a direct infringement of the employes' right "to engage in other concerted activities for the purpose of collective bargaining," as set forth in Section 7 of the Federal Act.

To answer this contention it should be noted at the outset that the right to strike is not an absolute and unqualified right. *International Union v. Wisconsin E. R. Board,* 336 U.S. 245; *Allen-Bradley Local v. Wisconsin E. R. Board,* 315 U.S. 740.

Section 7 of the Taft-Hartley Act recognizes the right of employes to engage in "concerted activities." Did Congress by the use of this general term intend to take away from a state its power to protect its inhabitants in respect to the maintenance of essential public utility services? We contend that Congress had no such intention. This Court has said that "the intention of Congress to exclude the States from exercising their police power must be clearly manifested," and that the Court "will not lightly infer that Congress by the mere passage of a Federal Act has impaired the traditional sovereignity of the several states in that regard." *Allen-Bradley Local v. Wisconsin E. R. Board, supra; International Union v. Wisconsin E. R. Board, supra.*

A. Background.

1. The Wisconsin Legislature sought to protect the public from the dire consequences that result from the interruption of an essential public utility service.

Chapter 414 of the Wisconsin Laws of 1947 prohibits employes of public utilities from striking and requires them and their employers to submit their labor disputes to arbitration, when they reach an impasse or stalemate.

The legislature included in the Act a declaration of public policy. In this declaration it is declared that it is necessary and essential to the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employes. It is recognized in the declaration that interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the employers and employes. The legislative declaration of policy as set forth in the statute is as follows:

> "111.50 *Declaration of policy.* It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employes which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employes, and to provide settlement procedures for labor disputes between public utility employers and their employes in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare."

In the enactment of this statute it is apparent that the legislature took into consideration the dire consequences

that may result from the interruption of essential public utility services. The facts hereinafter stated are matters of common knowledge and doubtless they among others served as as inducement for the passage of this law. Electrical energy supplied by public utility companies, among a multitude of other uses, is used for the following purposes:

(1) To pump water for purposes of human consumption, sanitation and to afford fire protection;

(2) To pump sewage incident to the disposal of sewage by metropolitan sewage disposal plants;

(3) To operate oil burners used to heat homes, factories and offices;

(4) To heat domestic hot water;

(5) To heat buildings in metropolitan downtown areas where the heat is supplied from a central steam system, which heat constitutes a by-product of the generation of electricity;

(6) To furnish light in homes, offices and factories;

(7) To light public streets and thoroughfares;

(8) To cook and prepare food upon electric ranges;

(9) To supply power for the operation of factories and commercial enterprises;

(10) To operate traffic control signals and fire and police alarms;

(11) To operate airport signals and furnish airport lighting;

(12) To operate railroad safety signals;

(13) To operate X-ray machines and other hospital equipment and appliances;

(14) To operate and propel street cars and trackless trolleys;

(15) To operate elevators in multiple-storied buildings; and,

(16) To supply the farmer with power essential to the operation of water pumps, milking machines and various kinds of farm equipment.

It does not require a high degree of imagination to realize the consequences that may be incident to the interruption of electric service. Many thousands of homes would be unheated; it would be impossible to properly cook and prepare foods for human consumption; there would be no adequate water supply for human consumption or for purposes of sanitation; practically all of the large industrial factories would be required to close their doors because of lack of power to operate the same and as a result many thousands of employes would be thrown out of work; there would be great hazard from fire; and with unlighted public streets and lack of electrical energy for operation of police signals crime might create a major problem.

Never in the history of the world has society been as complex as it is today or as dependent upon public uitlity services for the everyday necessities of life. Homes, factories and offices are all constructed and equipped in such manner as to require electrical energy for their proper maintenance and operation. Disease, famine, crime and fire may be expected to follow the interruption of electric service in densely populated areas.

That the needs and the rights of the public incident to the essential services of public utilities constitute the dominant factors involved in the enactment of this statute cannot well be doubted. The employers and employes involved in furnishing such essential services are engaged in businesses affected by a public interest. The law was

not enacted to confer special benefits upon either the employers or the employes it was enacted to benefit and protect the rights of the public who are innocent victims when a strike occurs inyolving the essential services of a public utility.

Wisconsin is not alone in its efforts to safeguard its inhabitants from interruptions in essential public utility. Ten other states have enacted comparable legislation.[1] In practically all of these statutes we find an express legislative declaration to the effect that the continuous and uninterrupted operation of public utilities is *essential* to the welfare, health, and safety of the citizens, and that it is contrary to the public policy of the state to permit any substantial interruption of such services. This is a clear indication that these states in the enactment of these statutes were solely seeking to protect their citizens and any restrictions on employers and employes were merely incidental.

2. Public Utilities are virtually agencies of the state.

In approaching this question we must bear in mind the unique nature of the public utility industry. In Wisconsin the operations of public utilities have been subject to state control and regulation for many years. The state not only determines what rates or fares the utility may charge, but it also determines and regulates the right to engage in or to discontinue operations, the quality and quantity of service to be rendered, the issuance of secur-

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[1] Florida Laws (1947), Chapter 23,911; Indiana Act (1947), Chapter 341; Kansas, General Statutes (1935), Chapter 44, Article 6; Massachusetts, Annotated Laws (1947), Chapter 150 B; Michigan Statutes Annotated (1947), Section 17.454; Nebraska Laws (1947), Chapter 178; New Jersey Laws (1947), Chapter 75; North Dakota Revised Code, Para. 37-0106; Pennsylvania Laws (1947), No. 485; Virginia Acts (1947), Chapter 9.

iies, the construction and expansion of facilities, and the manner and method of accounting. See opinion below, 257 Wis. 43, at 47.

In a very recent case involving the same issue as is here presented, the Wisconsin Supreme Court stated:

> "* * * Congress has no power to question the states' control over their utilities. That power rests with the states. The states exercise such powers on the theory that *the utilities are state agencies.* They perform functions which the states might perform directly rather than through agencies to which they delegate their own powers. Under a proper interpretation of the federal act, the state is still sovereign in the field covered by the public utility anti-strike law. The federal act makes provision for national emergencies, but it does not and cannot legislate in the field of local emergencies." (Emphasis supplied) *Wisconsin E. R. Board v. Milwaukee Gas Light Co.,* 44 N.W. 2d 547 (Nov. 8, 1950)

Public utilities as agencies of the State of Wisconsin have been delegated to carry out some of the sovereign power of the state. For example, public utilities have been delegated the power of eminent domain. Section 32.02, Wisconsin Statutes. It has often been stated that eminent domain is an attribute of sovereignty. *Mississippi and R. R. B. Co. v. Patterson,* 98 U.S. 403. No ordinary private industry possesses such power. The exercise of this great power has not been conferred upon public utilities to benefit the stockholders but has been conferred upon them as instrumentalities or agencies of the state for the benefit of the public. Public utilities in Wisconsin are virtually an arm of the state. Only because the state and its political subdivisions have not seen fit to engage directly in the public utility business, do we find private enterprise engaged in the business, and

subject to broad and extensive governmental regulation. All public utilities in Wisconsin have been operating for many years under what is commonly called the Indeterminate Permit Law. Sections 193.34 et. seq. (street railways); Chapter 197, and Section 196.57 (other utilities). In general, all utilities have by operation of law consented to municipal acquisition of their plants and facilities whenever a municipality by the majority vote of its electorate has determined to acquire said plant and facilities. The right of a finding of necessity by a jury has been waived. All that remains to be done is a determination of the compensation to be paid to the utility.

The welfare of the state and of its citizens is directly involved in the continuous operation of the public utilities created and regulated by the state. The fact that a public utility may be privately owned rather than publicly owned is unimportant. Public utilities serve exactly the same functions regardless whether they are in private or public ownership. Therefore from a constitutional standpoint the decision in this case should be made on the basis of the same legal principles as would apply if all the public utilities of Wisconsin were owned and operated by the state. The public utility business is not an ordinary business,—it is a business peculiarly affected by a public interest. The activities of a public utility publicly owned affect interstate commerce in precisely the same manner as the activities of such utility would affect such commerce if the utility were in private ownership.

This Court has consistently held that various constitutional guarantees do not impose restrictions upon the power of the individual states in the regulation of public utilities to the same extent as they may impose restrictions upon the states in the regulation of ordinary business

enterprises. For example, the Constitution guarantees freedom of contract, privacy, due process of law, equal protection of the law, as well as many other rights. An entirely different application has been given to constitutional provisions in respect to the power that a state may exercise over a public utility, its property and its employes, as compared to the power which a state may exercise over ordinary business ventures. Yet we find that the constitutional provisions do not contain any express language differentiating between the public utility business and ordinary business activities. The general language contained in these constitutional provisions has been interpreted by this Court to mean one thing when applied to the power of a state over its public utility businesses and quite another thing when applied to the power of a state over ordinary business activities. If the courts may properly interpret general language in the Constitution as having a different application in respect to public utilities than in respect to ordinary business, why may not the Taft-Hartley Act have a similar interpretation? Certainly it is not more sacred nor free from interpretation than the Constitution of the United States.

The constitutional guarantee of freedom of contract has been interpreted as a restriction upon the power of a state to fix prices (except under unusual circumstances) to be charged by persons engaged in ordinary businesses but it has been held to impose no such restriction in respect to the prices which a public utility may charge for its services. *Munn v. Illinois,* 94 U.S. 113. Why may not the Taft-Hartley Act be given a comparable interpretation?

If the Wisconsin legislature had enacted a statute directly fixing the wages of public utility employes, it could not well be doubted that such an act would be an appropriate exercise of legislative power. The fact that

the legislature has delegated this function to a state tribunal when the parties are unable to agree upon such wages does not mean that it thereby loses the character of a legislative function. It has been held that the power of a state to prescribe the rates which a public utility shall be permitted to charge for the services it renders is a legislative function, regardless whether the legislature acts directly in the matter or delegates it to an administrative tribunal. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1. If the legislature in the exercise of its legislative function were to enact a statute prescribing a definite amount of wages and pensions to be paid by a public utility to all of its employes, and if it also definitely prescribed all conditions of employment, could it be reasonably maintained that such a statute would be invalid on the ground that it conflicted with the Taft-Hartley Act in that the employes had no opportunity to bargain in respect to wages, pensions and working conditions? If this is the correct interpretation of the Taft-Hartley Act it necessarily follows that even in respect to publicly owned public utilities, Congress could, from a constitutional standpoint, render a state legislature powerless to enact a law establishing wages, pensions, or employment conditions for public utility employes. Whether a state legislature itself prescribes wages, pensions or working conditions, or delegates such function to a subordinate or administrative body (i.e., arbitrators) is quite immaterial because in either case it represents the action of the state. *Knoxville v. Knoxville Water Co., supra.* In the *Knoxville Water Co.* case, this universally recognized rule was stated as follows:

> "Nevertheless the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom

the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power." (p. 378)

It is with this background in mind that we approach the question of conflict with the Taft-Hartley Act.

B. The Constitution was intended to create "an indestructible Union, composed of indestructible States."

1. It is improper to interpret the commerce clause as giving to Congress the power to destroy state governments.

The members of plaintiff Union and the individual plaintiffs are not engaged in interstate commerce. They are engaged solely in intrastate commerce. They contend, however, that their activities affect interstate commerce and therefore the State is without power to prescribe their wages and working conditions because to do so would conflict with the Taft-Hartley Act. If this be true it would seem that this Court has erred when it has declared that our Constitution looks to "an indestructible Union, composed of indestructible States".

That every reasonably permissible presumption should be made against the deprivation of a government of its sovereign power is clearly indicated by the language of the Supreme Court in *Texas v. White*, 7 Wall. 700, 725, as follows:

> "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution

as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

If a state is to be powerless to exercise its police power as a means of protecting its right to insure the continuity of essential public utility services, it would seem that the rights of states are fictitious. This Court has recognized on numerous occasions that it would be contrary to the intention of the framers of our Constitution if the federal government were to be permitted to swallow up and destroy state governments. Acting upon this basic principle it was, at an early date, held that because "the power to tax is the power to destroy" neither the federal government nor the state governments should be allowed to tax governmental instrumentalities of the other. *Collector v. Day*, 11 Wall. 113; *McCulloch v. Maryland*, 4 Wheat. 316.

Both the federal government and the state governments admittedly have the power to tax and there is no express language in the Constitution which prohibits either from taxing the governmental instrumentalities of the other. When the people gave to Congress the power to regulate interstate commerce did they thereby intend to in effect give Congress the power to destroy a state government by making it impossible for a state to regulate employes of an intrastate public utility engaged in furnishing the vital necessities of life in such state? If so, the statement that our Constitution created "an indestructible Union, composed of indestructible States" is mere mockery.

Under our form of government sovereignty is divided between the federal government and the state governments. It has been called a dual form of sovereignty. Each exercises sovereign prerogatives. In holding that

in the absence of express language a statute should not ordinarily be interpreted as a limitation upon a sovereign authority, the Court in *United States v. United Mine Workers of America,* 330 U.S. 258, 272, said:

> "There is an old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect. * * * Congress was not ignorant of the rule which those cases reiterated; and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use 'clear and specific (language) to that effect' if it actually intended to reach the Government in all cases."

The following statement appears in a footnote to the above opinion:

> "The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him (the sovereign) in the least, if they may tend to restrain or diminish any of his rights or interests." Dollar Sav. Bank v. United States, 19 Wall (U.S.) 227, 239, 22 L. ed. 80, 82 (1873). "If such prohibition is intended to reach the government in the use of known rights and remedies, the language must be clear and specific to that effect." United States v. Stevenson, 215 U.S. 190, 197, 54 L. ed. 153, 156, 30 S. Ct. 35 (1909)

C. The Wisconsin Act is fully in accord with the intent of Congress in enacting the Taft-Hartley Act.

1. Congress recognized that parties to labor disputes have no right to engage in practices which jeopardize the public health, safety, or interest.

Under its constitutional power "To regulate commerce * * * among the several states", (Sec. 8, Art. I, U.S.

Const.) Congress enacted what is commonly known as the Wagner Act which in 1947 was superseded by the so-called Taft-Hartley Act, otherwise known as the Labor Management Relations Act of 1947. Section 7 of the latter Act has considerable language which is identical with language in Section 7 of the former Act. Section 7 of the Wagner Act provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *concerted activities,* for the purpose of collective bargaining or other mutual aid or protection." (Emphasis supplied)

Section 7 of the Taft-Hartley Act provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities* for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." (Emphasis supplied)

Petitioners contend that compulsory arbitration of labor disputes and the prohibition of strikes by employes engaged in essential services of public utilities constitute a violation of the provisions of Section 7 of the Taft-Hartley Act as above set forth.

Respondent Transport Company recognizes that a state cannot by its legislative enactments supersede or nullify statutes of the National Congress which have been duly enacted pursuant to constitutional authority; however, it

contends that there is no conflict between Chapter 414, Wisconsin Laws of 1947, and Section 7 of the Taft-Hartley Act when those statutes are properly construed.

It has often been stated that the intention of the Congress in the enactment of a statute is the polar star that must serve as the guide for the interpretation and construction of such statute. To properly construe Section 7 of the Taft-Hartley Act it therefore becomes necessary to consider the purpose or purposes which motivated Congress in the enactment of this statute.

Fortunately we are not in the dark on this subject because in Section 1 of the Taft-Hartley Act entitled "Short Title and Declaration of Policy" we find in clear and unmistable language the primary objective which Congress sought to achieve, viz., "the free flow of commerce." Congress further declared that industrial strife which interferes with the normal flow of commerce can be avoided or substantially minimized if employers, employes, and labor unions *"above all* recognize under law that neither party has any right in its relations with any other *to engage in acts or practices which jeopardize the public health, safety, or interest."* (Emphasis supplied). Another expressed purpose of the Act was "to protect the rights of the public in connection with labor disputes affecting commerce."

Here is express recognition that all parties to labor disputes have no right to engage in acts which jeopardize the public health, safety, or interest. What act by a labor union could more seriously and vitally affect the public health and safety than a public utility strike? Clearly the Wisconsin law is in full accord with the expressly declared purposes and policies of the Taft-Hartley Act. The Wisconsin Act was designed "to protect the rights

of the public in connection with labor disputes." The Wisconsin legislature had solely in mind "the public health, safety, or interest." The purpose of the Act was not to take away rights of the employes and employers of the public utility industry, but to protect the public. To accomplish this goal, the rights of the employers and employes necessarily had to be restricted. Neither was given any advantage.

2. Congress has not legislated beyond the right of employes to be free from employer coercion.

(a) The Wisconsin Law has not infringed upon this right.

In commenting upon the fundamental purpose of the Wagner Act, Justice Frankfurter, in a dissenting opinion in *Hill v. Florida,* 325 U.S. 538, declared:

> "* * * It is an accurate summary of the Wagner Act to say that it aimed to equalize bargaining power between industrial employees and their employers by putting Federal law behind the employees' right of association. The whole plan or scheme of the Wagner Act was to enable employees to bargain on a fair basis, freed from 'restraint or coercion by their employers' through the protection given by the Federal government.
>
> * * * * *
>
> *"All activities or aspects of labor organizations outside of their right to be free from employer coercion were left wholly unregulated by that Act.* (Emphasis supplied).
>
> * * * * *
>
> "It wipes out State power and distorts Congressional intention to disregard the limited policy explicitly set forth by Congress. That policy—curbing of employer interferences with union rights—was scrupulously observed by Congress in the substantive

> provisions as well as in the enforcement structure of the Act. There is not a breath in the Act referring to any aspect of union activity unrelated to employer interference therewith. By refusing to legislate beyond that, Congress did not forbid the States from so legislating. * * * (p. 558, 559)

Justice Frankfurter's above statement is equally applicable to the Taft-Hartley Act. The Wisconsin law in no respect infringes upon the right of employes to be free from employer coercion. This right is wholly untouched by the Wisconsin law. Employers have not been given any additional rights under the Wisconsin law. In fact, employers under the Act are prohibited from locking out employes. Section 111.62. The Wisconsin law covers the field in which Congress did not act. This field was left open to state legislation.

We are unable to find any clear manifestation in the Taft-Hartley Act that the states were being excluded from exercising their police power to protect the public health and safety. On the contrary, as pointed out above, Congress expressly declared that neither employers nor employes have any right "to engage in acts or practices which jeopardize the public health, safety, or interest." Section 1(b).

D. General terms should be interpreted so as not to lead to absurd results.

1. General terms appearing in constitutions and statutes have been limited in their application so as to lead to no absurd results.

To construe Section 7 of the Federal Act as foreclosing the State of Wisconsin from enacting this law to prevent the interruption of vital public utility services

is to lead to an absurd result. One of the first and foremost canons for the interpretation or construction of words in a constitution or statute requires that the intention of the lawmakers must control and when general language is used and a literal interpretation thereof would result in absurd consequences, such general language is not to be given a literal interpretation. In *Jacobson v. Massachusetts,* 197 U.S. 643, 655, this Court set forth this familiar rule as follows:

> "'All laws,' this court has said, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' *United States v. Kirby,* 7 Wall. 482, 19 L. Ed. 278; *Lau Ow Bew v. United States,* 144 U.S. 47, 58, 36 L. Ed. 340, 344, 12 Sup. Ct. Rep. 517."

In *Church of the Holy Trinity v. United States,* 143 U.S. 226, 228, this Court said:

> "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

In *United States v. American Trucking Association*, 310 U.S. 534, this Court declared as follows:

> "* * * Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of the words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" (p. 543)

It is inconceivable that Congress intended that a state should be powerless to adequately protect its citizens from the dire consequences that inevitably follow from a public utility strike. Did Congress by the passage of the Taft-Hartley Act intend to deny to the states and to confer upon the employes of a public utility the right to determine whether the people should have heat with which to warm their homes and cook their foods, power with which to pump water for domestic uses and for fire protection, power for the operation and use of factories, elevators, street lighting, street cars, trackless trolleys, signals for police and fire alarms, and for railroads and airports? Did Congress conclude that it would aid "the free flow of commerce" by so doing? If such be the fact it would appear that it is an idle boast to declare that under our system of government we have a dual form of sovereignty—"an indestructible Union composed of indestructible States."

The terms "collective bargaining" and "concerted activities" as used in Section 7 of the Taft-Hartley Act are

general in their nature. Congress did not give a definition of either term. It is a common rule of statutory construction that when a legislative body has used general terms in a statute the lawmakers must have intended that such general terms may be interpreted to limit the effect of the statute so that it will not produce unreasonable results—results that could not have been intended by the lawmakers.

The same result is applied to the interpretation of general words appearing in constitutional enactments. For example, the right of freedom of speech has been held not to be an absolute right even though the United States Constitution itself makes no qualification. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490; *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722; *Near v. Minnesota*, 283 U.S. 697; *Gitlow v. New York*, 268 U.S. 652.

In *Gitlow v. New York, supra*, this Court declared:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. * * * Reasonably limited, it was said by Story (Story on the Constitution, page 634), in the passage cited, this freedom is an *inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.*" (p. 666) (Emphasis supplied)

In *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, this Court, in referring to the right of working men to organize for legitimate objects, stated:

> "The cardinal error of the defendant's position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others." (p. 355).

Justice Holmes in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, declared as follows with respect to the limitations which the police powers of a state place upon fundamental rights:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side." (p. 355)

Nor is the liberty of contract an absolute right. *Munn v. Illinois*, 94 U.S. 113; *Frisbie v. United States*, 157 U.S. 161. In the *Frisbie* case it was held that:

> "While it may be conceded that, generally speaking among the inalienable rights of the citizens is that of the liberty of contract, yet such liberty is not absolute and universal." (p. 165).

At an earlier date the Court in speaking of the "implied reservations" in constitutional and statutory enactments, declared:

> "There are limitations on such power which grow out of the essential nature of all free governments.

> Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." *Savings and Loan Assoc. v. Topeka,* 20 Wall. 655.

If general words in constitutional guaranties are subject to limitations and qualifications, certainly general words appearing in the Taft-Hartley Act are equally subject to limitations as a means of carrying out the intent and purpose that prompted the passage of the law.

E. Congress has made it clear that the right to strike is Limited.

An examination of the legislative history of Section 13 of the Taft-Hartley Act clearly shows that the right to strike as set forth in Section 7 is a qualified right. Section 13 of the Wagner Act, 29 U.S.C.A. § 163 provided:

> "Nothing in sections 151-166 of this title shall be construed so as to interfere with or impede or diminish in any way the right to strike."

The Taft-Hartley Act amended Section 13 by adding the italicized words, so it now reads:

> "Nothing in *this subchapter, except as specifically provided for herein,* shall be construed so as either to interfere with or impede or diminish in any way the right to strike, *or to affect the limitation or qualification on that right.*" (Emphasis supplied).

The Report of the Committee of Conference includes the following statement with respect to the amendment of Section 13:

> "Section 13 of the existing National Labor Relations Act provides that nothing in the act is to be construed so as to either interfere with or impede

or diminish in any way the right to strike. Under the House bill, in section 12(e), a provision was included to the effect that except as specifically provided in section 12 nothing in the act should be so construed. Under the Senate amendment, in section 13, section 13 of the existing law was rewritten so as to provide that except as specifically provided for in the act, nothing was to be construed so as either to interfere with or impede or diminish in any way the right to strike. The Senate amendment also added one other important provision to this section, providing that *nothing in the act was to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right.* The conference agreement adopts the provisions of the Senate amendment. * * *" (Emphasis supplied) House Report No. 510, June 3, 1947, (U.S. Code Congressional Service, 80th Congress, First Session, 1947, pages 1165-1166)

We are not to be left to conjecture as to the interpretation to be given to Sections 7 and 13. This Court in the *Briggs & Stratton* case, (International Union v. Wis. E. R. Board, 336 U.S. 245), held that the Wisconsin board could order the union to cease and desist from instigating intermittent and unannounced work stoppages. In that case the labor union claimed that such activities constituted "concerted activities" as authorized by Section 7 of the Federal Act and the State Act prohibiting such activities was in conflict with the Federal Act. In the course of the opinion, Justice Jackson, speaking for the majority of the Court, in holding there was no such conflict, said:

" * * * Unless we read into § 13 words which Congress omitted and a sense which Congress showed no intention of including, *all that this provision does is to declare a rule of interpretation for*

the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other laws. It did not purport to modify the body of law as to the legality of strikes as it then existed. This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike,' Dorchy v. Kansas, 272 U.S. 306, 311, 71 L. Ed. 248, 269, 47 S. Ct. 86." (Emphasis supplied)

* * *

" * * * That Congress has concurred in the view that neither § 7 nor § 13 confers absolute right to engage in every kind of strike or other concerted activity does not rest upon mere inference; indeed the record indicates that, had the Courts not made these interpretations, the Congress would have gone as far or farther in the direction of limiting the right to engage in concerted activities including the right to strike." (See full text of Committee Report at Note 15, 336 U.S. 245, 260)

This Conference Report of the Senate and House conferees which recommended the adoption of the Taft-Hartley Act, and the statements of Congressman Hartley, remove all vestige of doubt concerning the Congressional intention. Congressman Hartley specifically stated that the bill would not invalidate state laws concerning unfair labor practices, and the Conference Report in the portion relating to Section 7 of the Act states that the "concerted activities" authorized pertain only to lawful activities. The Conference Report prepared by the House and Senate conferees put the bill in its final form. The Report submitted by Mr. Hartley (Report No. 510) includes the following statements concerning Section 7 of the Taft-Hartley Act:

"Thus the courts have firmly established the rule, that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. (p. 1144)

* * *

"By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act." (p. 1145)

The Report further stated that such "undesirable concerted activities are not to have any protection under the Act." (p. 1145)

On page 6540 of Volume 93 of the Congressional Record (Legislative History, p. 883) statements made by Congressman Hartley, a co-author of the bill, in response to an inquiry by Wisconsin's Congressman Kersten, are set forth as follows:

"Mr. Kersten of Wisconsin: * * *

'I would like to ask the gentleman about that portion which pertains to the validity of state laws. We are very anxious that disputes be settled at the state level so far as it is possible. Can the gentleman give us assurance on that proposition, so that it is a matter of record, that that is the sense of the language and of the report?'

"Mr. Hartley:

'That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In

other words, this will not interfere with the validity of the laws within that State'."

The statements of Mr. Hartley clearly indicate that Congress was aware of the importance of permitting states to continue to exercise their traditional police powers concerning such labor practices as the states may regard as inimical to the public welfare.

While statements made on the floor of the Senate or the House by senators or representatives who were not in charge of a bill are without weight in the interpretation of a statute (*McCaughn vs. Hershey Chocolate Co.*, 283 U.S. 488), such statements when made by an author or sponsor of a bill are entitled to consideration in interpreting the meaning of the statute which results from the passage of the bill.

In *Wright vs. Mountain Trust Bank*, 300 U.S. 440, the Court stated:

> "Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure."

From the foregoing it is clear that the right to engage in concerted activities for the purpose of collective bargaining (Section 7) is not an absolute right. Congress did not intend to foreclose the states from exercising their police powers to safeguard the public health and safety. The Wisconsin act thus does not conflict with the Federal act, but goes beyond the scope of the latter and covers a field intended by Congress to be left to the states.

F. The "Intention of Congress to Exclude States from Exerting their Police Powers Must be Clearly Manifested."

In the field of labor relations it is a well established principle that an intention of Congress to exclude states from exerting their police power must be clearly manifested. *Allen-Bradley Local v. Wisconsin E. R. Board*, 315 U.S. 740; *International Union v. Wis. E. R. Board*, 336 U.S. 245; *Algoma P. & V. Co. v. Wisconsin E. R. Board*, 336 U.S. 315.

In *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, the Court had under consideration a Wisconsin statute which declared it to be an unfair labor practice for employes to intimidate or coerce other employes by mass picketing and similar acts. The union contended that its members' acts constituted "concerted activities" within the meaning of Section 7 of the Wagner Act and by reason thereof the statute of the state which prohibited such activities was in conflict with the federal laws. The Court declared:

> "We agree with the statement of the United States as amicus curiae that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity. The Committee Reports on the federal Act plainly indicate that it is not 'a mere police court measure' and that authority of the several States may be exerted to control such conduct. Furthermore, this Court has long insisted that an '*intention of Congress to exclude States from exerting their police power must be clearly manifested.*'
>
> * * *
>
> "*We will not lightly infer that Congress by the mere passage of a federal Act has impaired the*

tradtional sovereignty of the several States in that regard." (p. 748) (Emphasis supplied)

The Court's decision in the foregoing case was rendered in 1942. The Taft-Hartley Act was adopted in 1947. The language of Section 7 of the Wagner Act concerning the right of employes "to engage in concerted activities" is the same as appears in Section 7 of the Wagner Act. When Congress used this language in its 1947 enactment it incorporated by reference the judicial interpretation which that language had received as a part of the Wagner Act. In other words, the judicial interpretation as set forth in the Court's opinion in the *Allen-Bradley* case (315 U.S. 740) is now deemed to be incorporated into Section 7 of the Taft-Hartley Act.

In *Hecht vs. Malley*, 265 U.S. 144, the Court stated the general rule as follows:

> "In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this court to such language, and made it a part of the enactment." (p. 153)

This Court in *International Union v. Wisconsin E. R. Board, supra,* (Briggs & Stratton case) in considering a contention that the Wisconsin Employment Peace Act was in conflict with the Taft-Hartley Act, reiterated the principle that it had announced in the *Allen-Bradley* case:

> " * * * However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude the States from exercising their police power must be clearly manifested.' Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Bd., 315 U.S. 740,

> 749, 750, 86 L.Ed. 1154, 1164, 1165, 62 S.Ct. 820. We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case." (p. 253)

* * *

In *Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 301, this Court said that

> " * * * it is not even necessary to invoke the principle that in cases of concurrent power over commerce State law remains effective so long as Congress has not manifested an unambiguous purpose that it should be supplanted. * * * "

We search in vain for any clear manifestation that Congress has excluded the state police powers in cases such as these. Petitioner seems to contend that because there is no express provision in the Federal Act *reserving* to the states the right to exercise their police powers in cases such as this, Congress intended that the states were forbidden from exercising such powers. To the contrary, the burden is on petitioner to show an express declaration that the state powers were to be excluded. This it has failed to do.

Did Congress in the enactment of the Taft-Hartley Act intend to deny states the right to exercise their police powers? Was that statute intended to serve as a limitation upon the powers of the states or was it merely intended to serve as a limitation on the power of private persons—employer and employes? The presumption should be that Congress did not intend to deprive a sovereign power of its authority over its citizens. *United States v. United Mine Workers of America*, 330 U.S. 258; *United States v. Herron*, 20 Wall. 251; *Texas v. White*, 7 Wall. 700. See the quotations from these cases appearing at pages 23 and 25 of this brief.

To assume that Congress by the enactment of the Taft-Hartley Act intended that a state should not have the right to protect itself by enacting laws which are designed to secure the essential services of its public utilities is to assume that Congress was indifferent to the safety, health and comfort of all of the citizens of the various states.

G. Congress has prohibited Federal employes from striking in order to prevent the interruption of vital Federal services.

1. It was not necessary to grant similar powers to the states as they already possessed such powers under the Tenth Amendment.

Congress through the enactment of Section 305 of the Taft-Hartley Act made it unlawful for Federal employes or employes of wholly owned government corporations, to go on strike. 61 Stat. 160, 29 U.S.C.A. § 188. Section 305 provides as follows:

> "It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strikes. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for re-employment for three years by the United States or any such agency."

Under this statute the employes of the TVA or any other federal power project are prohibited from striking. Yet petitioner in effect contends that the State of Wisconsin cannot prohibit the employes of the electric power company in Milwaukee from striking.

Congress undoubtedly felt that in order to prevent any interruption of the vital service rendered by the Federal

Government and its agencies, it was necessary to prohibit strikes by Federal employes. Can it therefore be reasonably argued that by recognizing in Section 7 the right of employes to engage in "concerted activities," Congress intended to deprive the states from enacting similar measures to assure the continuity of vital services within their boundaries? When we consider that the states already possessed such power under the Tenth Amendment, it is apparent that it was not necessary that Congress grant such power to the states. To interpret the Act otherwise would be to say that Congress intended to discriminate against the states in favor of the Federal government.

H. Congress has provided for injunctions against strikes which would imperil the national health and safety.

1. It was left to the states to take similar measures to cope with emergencies affecting the health and safety of their citizens.

The "public utility anti-strike" law of New Jersey was held not to be in conflict with the Taft-Hartley Act in *In re New Jersey Bell Telephone Co.*, 26 LRRM 2585 (N.J. Sup. Ct., October 2, 1950). In this case it was the union who was seeking to uphold the statute and the company was attacking it. The court pointed out that Sections 206-210 of the Taft-Hartley Act provide for the enjoining of strikes which would imperil the national health or safety. 61 Stat. 154, 29 U.S.C.A. §§ 176-180. Were the states foreclosed from enacting similar measures to cope with local emergencies? In upholding the state statute, the court said:

> "* * * Our examination of the Federal Act discloses no provision therein which prohibits a state,

> in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in Sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the 'intention of Congress to exclude the states from exerting their police power must be clearly manifested,' Allen-Bradley Local vs. Wisconsin Employment Relations Board, 315 U.S. 740, * * * we conclude that the right of the states to prohibit strikes or lockouts in this sphere has not been pre-empted by Congress, and that the O'Brien case, supra, is inapplicable to the present situation."

As above pointed out Congress sought only to legislate with respect to emergencies imperiling the *national* health and safety. Certainly it was not the intent of Congress by so legislating to foreclose the states from taking measures to prevent emergencies confined within its own borders. Obviously Congress recognized that this was a field for state legislation.

It would not have been feasible for Congress to legislate with respect to local emergencies. Certainly it was

not the intent of Congress by so legislating with respect to national emergencies to foreclose the states from taking measures to prevent emergencies confined within their own borders. Obviously Congress recognized that local emergencies could be more feasibly coped with from the state level. Congress wisely left this field for state legislation.

Petitioner contends that the failure of Congress to approve fully those provisions of H.R. 3020 which dealt with "Strikes Imperiling Public Health and Safety", by eliminating the terms "public utilities" and "public health, safety or interest", and limiting the application of Sections 206-210 to strikes affecting an "entire industry or substantial part thereof" which would "imperil the national health", is indicative that states were to be excluded from legislating with respect to emergencies arising in public utility industries. On the contrary, it is indicative that Congress wanted the Federal Government to intervene in emergencies only of a national scale. The states already possessed the power to cope with emergencies at the local level. Congress did not want the Federal Government to occupy this field.

Petitioner makes the same contention with respect to the rejection of the five identical bills (H.R. 14, 34, 68, 75, 76). The purpose of the bills was to leave the handling of local emergencies to the state and local governments. Doubtless the bills were defeated because the states already possessed such powers. No Congressional enactment was required for this purpose. These bills also provided that when the President found that a public emergency existed and the local government facilities had failed, he could issue an order forbidding a work stoppage. A compulsory arbitration procedure was provided for; the President to appoint the panel members.

Extension of Remarks of Rep. Case, 93 Cong. Rec. A-1007-8.

The rejection of these bills cannot be said to evidence an express intention that states were to be excluded from coping with emergencies arising out of public utility labor disputes. Again it is indicative only of the Congressional intent to limit as much as possible any intervention by the Federal Government into labor disputes. If such bills were passed, Congress obviously reasoned that the Federal Government would be intervening in many local labor disputes. That Congress intended that the Federal Government should intervene only in the event of a national emergency is borne out by the majority Report of the Senate Committee, (S. Rep. 105, 80th Cong., 1st Sess., p. 14):

> "While the committee is of the opinion that in most labor disputes the role of the Federal Government should be limited to mediation, we realize that the repercussions from stoppages in certain industries are occasionally so grave that the national health and safety is imperiled. An example is the recent coal strike in which defiance of the President by the United Mine Workers Union compelled the Attorney General to resort to injunctive relief in the courts. The committee believes that only in national emergencies of this character should the Federal Government be armed with such power. But it also feels that this power should be available if the need arises."

It seems absurd to say that because Congress wanted to limit intervention by the Federal Government to cases of national emergencies caused by strikes in entire industries, that this was an express declaration that states were to be foreclosed from coping with local emergencies arising out of public utility labor disputes. The states

have always had this power. Where then is the clear manifestation in the Federal Act that the states were deprived of such powers? See *Allen-Bradley Local v. Wisconsin E. R. Board*, 315 U.S. 740; *International Union v. Wisconsin E. R. Board*, 336 U.S. 245.

On the contrary, we find an express declaration in the Federal Act that the Federal Mediation and Conciliation Service was not to be used where the labor dispute was local in nature and state facilities were available. Section 203(a) provides in part:

> "The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if the State or other conciliation services are available to the parties."

Thus it is clear that Congress intended that the states would mediate such labor disputes as the one involved in the case at bar. And when such a labor dispute imminently threatens to cause a state of emergency, it is equally clear that the "National Emergency" sections (206-210) would not be applicable. As heretofore pointed out, this section is to be used only in case of a strike in an *entire* industry which imperils the *national* health or safety. In view of the foregoing, how can it be reasonably contended that Congress intended that the states be foreclosed from enacting legislation such as the Wisconsin law here involved?

Section 7 of the Taft-Hartley Act contains the same language as did Section 7 of the Wagner Act. As the Wagner Act was interpreted, the right to engage in "concerted activities" was not absolute, notwithstanding the general language of the statute, e.g., *Allen-Bradley Local v. Wisconsin E. R. Board*, 315 U.S. 750. In enacting the Taft-Hartley Act, the conferees

expressly stated that they purposely avoided enumerating the qualifications because they were fearful that any specific enumeration might have a limiting effect and thus make certain conduct not enumerated subject to the protection of the Act. H. Rep. No. 510.

The same can be said for not adopting the provision of Representative Hartley's bill or the five other bills above mentioned. Recognizing that under the interpretation of the Wagner Act, the states were not excluded from exercising their police powers to cope with matters of local concern, Congress apparently felt that any attempt on their part to specifically set forth provisions dealing with emergencies arising at the local level would have a limiting effect, because any situations not enumerated would possibly be interpreted as not intended to be included.

I. The O'Brien case is not applicable to the present issues.

1. A public utility strike is not a traditional, peaceful strike.

Petitioner contends that *International Union v. O'Brien,* 94 L.ed. 659, (October Term, 1949), is completely determinative of the issue. The Michigan statute involved in that case was a general labor relations law and applied to *all* employes and employers generally. The Michigan act required a majority vote of all of the members of the bargaining unit before a strike could be called, whereas the Taft-Hartley Act has no such requirement. Thus, under the Michigan law, no group of employes in *any* industry or business within the state, regardless of whether it affected interstate commerce or not, could strike unless such majority vote was first obtained.

The Wisconsin statute, on the other hand, is narrowly confined to a single industry, and only applies under certain circumstances. The act only prohibits those strikes which would "cause an interruption of an essential service." Thus the act does not flatly prohibit *all* strikes in public utilities. If the service could continue to be furnished, notwithstanding a strike among some of the employes, such a strike would not be within the prohibition of the act.

It is of the utmost importance to bear in mind the distinction between a broad, all-inclusive statute and a narrow statute which is confined to a concrete situation. *Milk Wagon Drivers U. v. Meadowmoor Dairies,* 312 U.S. 287, 297; *Thornhill v. Alabama,* 310 U.S. 88; *Carlson v. California,* 310 U.S. 106. See also *Giboney v. Empire Storage and Ice Co.,* 336 U.S. 490. In these cases it was recognized that, notwithstanding the general constitutional grants of freedom of speech, press, and peaceful assemblage, a state could restrict the exercise of such rights to preserve the peace and protect its citizens, if the restriction was narrowly confined and was not broad and sweeping in its application.

> "* * * 'We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger * * * as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.' 310 U.S. 105, 84 L.ed. 1104, 60 S.Ct. 736. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coersive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it

were an abstract prohibition of all picketing wholly unrelated to the violence involved." (Milk Wagon Drivers U. v. Meadowmoor Dairies, 312 U.S. 287, 297.)

Are the general rights recognized under Section 7 of the Federal Act to be accorded any greater sanctity than our constitutional rights? Clearly then, the State of Wisconsin can enact a narrowly confined statute to protect the public from the calamitous consequences of an interruption of a vital public utility service. The statute could not be more narrowly drawn. The legislature expressly found that the interruption of public utility service (as defined in the Act) results in damage and injury to the public and creates an emergency. (Section 111.50).

When we consider that the requirement of this Michigan act, with respect to a majority vote being a condition precedent to a strike, applies to *all* employers and employes, and further consider that the Taft-Hartley Act has no such requirement, it is not difficult to see why this Court in the *O'Brien* case held such a sweeping piece of legislation to be in direct and irreconcilable conflict with the federal law.

This Court in the *O'Brien* case said that *International Union v. Wisconsin E. R. Board* was not controlling because that case "was not concerned with a traditional, peaceful strike." It is submitted that a strike in a public utility industry is similarly not "a traditional, peaceful strike." True, there may be no violence whatsoever on the part of the striking workers, but the inevitable results of a public utility strike are of such a grave consequence, in fact they give rise to a state of emergency, that it cannot be said such strikes are of the traditional, peaceful nature. The traditional, peaceful strike in private industry affects only those immediately concerned, and then,

only in a *pecuniary* sense. On the other hand, a public utility strike, even though carried on in the most peaceful manner, affects the *entire community*, and not in a pecuniary sense, but it puts the *health and safety* of the community in grave peril. This Court in the *O'Brien* case, applying the principles laid down in the *International Union* case and the *Allen-Bradley* case, has made it clear that where the strike involved is not of a "traditional, peaceful" nature, the states are free to exercise their police powers. In cases of such strikes Congress has not preempted the field, but has left to the states the exercise of their traditional police powers. Justice Murphy in a dissenting opinion in the *International Union* case said:

> "* * * We have recognized that the phrase 'concerted activities' does not make every union activity a federal right. We have held that violence by strikers is not protected, Allen-Bradley Local, U.E.R. M.W. v. Wisconsin Employment Relations Bd., 315 U.S. 740, 86 L.Ed. 1154, 62 S.Ct. 820; that a sit-down strike, National Labor Relations Bd. v. Fansteel Metallurgical Corp., 306 U.S. 240, 83 L.Ed. 627, 59 S.Ct. 490, 123 A.L.R. 599, a mutiny, Southern S.S. Co. v. National Labor Relations Bd., 316 U.S. 31, 86 L.Ed. 1246, 62 S.Ct. 886, and a strike in violation of a contract, National Labor Relations Bd. v. Sands Mfg. Co., 306 U.S. 332, 83 L.Ed. 682, 59 S.Ct. 508, must be withdrawn from the literal language of §7. * * *." (336 U.S. 245, 269)

The *O'Brien* case was held not to be applicable by the New Jersey Supreme Court to New Jersey's "public utility anti-strike" law. In re *New Jersey Bell Tel. Co.*, 26 L.R.R.M. 2585, (October 2, 1950). A substantial portion of the court's opinion is quoted at page 43 of this brief. The court held the *O'Brien* case was not applicable because it involved a peaceful strike in a *private* industrial organization engaged in interstate commerce.

Referring to the fact that the New Jersey statute applied only to public utilities whose services are primarily interstate, the court said:

> "It is significant that in the *O'Brien* case, *supra,* the court said: 'Even if some legislation in this area could be sustained, the particular statute before us could not stand.'"

The New Jersey court further concluded that inasmuch as Congress had made provisions for the Federal Government to enjoin strikes which would create national emergencies, and had not expressly forbidden the states to take similar measures to cope with more localized emergencies, the right of the states to prohibit strikes and lockouts in this sphere had not been preempted by Congress.

The Wisconsin Court adopted the reasoning of the New Jersey Court in the recent case of *Wisconsin E. R. Board vs Milwaukee Gas Light Co.,* 44 N.W. 2d 547 (Nov. 8, 1950).

J. Compulsory arbitration is a substitute for the right to strike.

1. It is the only feasible way to break an impasse and at the same time assure the constant rendition of vital public utility services.

Petitioner asserts that the compulsory arbitration feature of the Wisconsin act conflicts with the right of employes to "bargain collectively" as set forth in Section 7 of the Federal Act. If, as we contend, a state may prohibit the right to strike when such a strike would interrupt an essential public utility service, it logically follows that the state can provide for compulsory arbitration as a substitute for the right to strike.

It should be noted that the right of public utility employes to strike has not been flatly denied by Wisconsin. Wisconsin has only denied the right to strike when such strike would "cause an interruption of an essential service". Section 111.62, Wis. Stats. Thus one group of employes in a public utility could conceivably go out on strike and not cause an interruption of an essential service. The Wisconsin law does not apply to such a situation.

Furthermore the compulsory arbitration features of the Wisconsin law do not destroy good faith collective bargaining, as petitioner asserts. On the contrary, we submit that it creates an additional incentive to bargain in good faith because unless both parties can come to an agreement by voluntary negotiation, the matter will be taken out of their hands entirely and be determined by the state through a statutory tribunal.

Under the Wisconsin law compulsory arbitration is only the last resort when all else has failed. The Wisconsin law does not even apply until the collective bargaining process has reached "an impasse and stalemate." Section 111.54, Wis. Stats. Then it requires a petition from either party to set the machinery of the law in motion. The next step is the appointment of a conciliator who is required to "exert every reasonable effort to effect a prompt settlement of the dispute." Section 111.54, Wis. Stats. Only after the conciliator has failed to effect a settlement does the arbitration provision come into play. Of course, the parties are free to negotiate a settlement between themselves even pending the decision of the arbitrators. Section 111.5[illegible], Wis. Stats. And the arbitration order itself can be changed by the agreement of the parties. Section 111.59, Wis. Stats.

Because Wisconsin has determined that strikes in public utilities are against the public policy of the state, it had to select a substitute for this coercive method of collective bargaining. Certainly the selection of compulsory arbitration, to come into play only when collective bargaining and conciliation have reached an impasse, was a reasonable one. It is the only feasible way to break an impasse, and at the same time assure the constant rendition of the vital public utility service. If the state through its police powers can prohibit strikes which threaten to interrupt essential public utility services, it only logically follows that it may provide for compulsory arbitration as an alternative.

2. The statements of Senator Taft are not persuasive to petitioner's position.

The statements of Senator Taft which petitioner has quoted in its brief are not persuasive to petitioner's position. They only go to show that Congress did not want to provide for compulsory arbitration on a nation-wide scale. By not adopting compulsory arbitration for *all* industries, does it necessarily follow that Congress intended that a state was foreclosed from providing for it in a single industry—one in which it was against the public policy of the state to permit strikes? Clearly Congress had no such intention. We are not dealing here with a competitive industry operated as a free enterprise, but with a public utility industry which has for years been closely regulated by the state.

It is submitted that merely because Congress refused to consider compulsory arbitration on a national scale, that is by no means an indication that Congress intended that states were powerless to adopt such a measure to prevent the interruption of essential public utility services within their borders.

3. The Wisconsin board does not have to find that the parties have bargained in good faith before it can appoint a conciliator.

Petitioner states at page 35 of its brief that under the Wisconsin Act the state board, before invoking the arbitration procedure, must first make a determination that the parties have bargained in good faith. Petitioner then argues that this conflicts with the superior jurisdiction of the National Board to make such determination. On the contrary, under the Wisconsin law the board only has to make a finding that the collective bargaining process has reached an impasse and stalemate, notwithstanding good faith efforts on the part of both parties, and that such dispute will cause an interruption of an essential service. Section 111.54 provides in part:

> "* * * Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, *notwithstanding good faith efforts on the part of both sides to such dispute,* has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. * * *"

Obviously the phrase "notwithstanding good faith efforts" does not mean the board must find that the parties have bargained in good faith. Paraphrased, it means that if the board finds that an impasse has been reached, *even though* there have been good faith efforts, it shall appoint a conciliator.

4. Employes are not precluded from attaining in compulsory arbitration what they might otherwise attain in collective bargaining.

At page 36 of its brief, petitioner asserts that by virtue of Section 111.58, the state has removed from the juris-

diction of the arbitrators, those matters over which the employer and union must bargain collectively. Section 111.58 provides:

> "The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union."

Petitioner has given this section a very broad and liberal interpretation. Obviously the legislature did not intend to remove from the jurisdiction of the arbitration those matters, such as wages, hours, and conditions of employment, which are universally regarded as proper subjects for collective bargaining. If such was the intention, the entire act would be meaningless. Clearly the legislature intended only to prohibit the arbitrators from passing on those subjects which are not usually regarded as proper subjects for collective bargaining.

5. There is no interference with the Federal mediation service.

At page 37 of its brief, petitioner contends that the Wisconsin law interferes with the mediation features of the Federal Act (Sections 203-205). The Federal Act expressly directs that the federal mediation service shall not be invoked where the labor disputes are local in nature, having only a minor effect upon interstate commerce, and state or other conciliation service is available. Sec. 203(b). In view of this it seems inconceivable that any conflict would arise. The fact that the federal service was invoked in this particular labor dispute is immaterial. Under the provisions of Section 203(b), it never should have been invoked.

K. A public utility employer has no bargaining power to meet the threat of a strike.

Petitioner contends that the prohibition of the right to strike does violence to the entire concept of collective bargaining, which is the process by which employes, through self-organization, are able to deal on terms approaching equality with the employer for the aggregate of the employes' services because of the employes' legal right and actual ability to quit work in concert. Petitioner fails to appreciate that in the public utility industry, if the employes were allowed to strike, the employer has no bargaining power. If a strike were to interrupt the service of an electric utility in a large metropolitan center, the employer would doubtless have to accede to the union demands in less than 24 hours. The interruption of the service would so vitally affect every inhabitant of the community, and the ensuing public pressure would be so great, that the employer would have no choice but to capitulate immediately. Unlike a private employer, a public utility employer cannot close his plant. He must render his services without fail every day of the year, and every hour of the day. A public utility employer has little, if any, bargaining power after its employes have gone on strike.

L. Every public utility employe has agreed not to strike by voluntarily continuing his employment in light of the statute.

Under well recognized rules of construction the pertinent laws of a state where a contract is made are deemed to be embodied and form a part of the contract. That is especially true when the contract is to be performed in such state.

That statute must therefore be interpreted in the same manner as though it expressly required every public utility employer and his employes to agree, as one of the conditions of the employment contract, that there would be neither a lockout nor a strike and that all disputes would be submitted to arbitration.

Obviously, under the statute, the employe is not compelled to enter into such a contract. However, by voluntarily continuing his employment in such business he must be deemed to have voluntarily agreed to such method of fixing wages and working conditions. The employer does not have the same option. The law requires him to continue to render services to the public.

If an employe of a public utility entered into a written contract containing provisions comparable to those set forth in Chapter 414, Wisconsin Laws of 1947, it would be illegal for such employe to strike.

In *National Labor Relations Board v. Sands Mfg. Co.*, 306 U.S. 332, it was held that "concerted activities," consisting of a strike in violation of the terms of a contract, must be deemed to "be withdrawn from the literal language of Section 7."

III.

THE WISCONSIN LAW DOES NOT VIOLATE THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

A. When a statute is challenged as being violative of the due process or equal protection clauses, there arises a presumption of constitutionality.

1. Petitioner has not shown that the legislature was acting clearly unreasonably and arbitrarily.

When a statute is challenged as being unconstitutional, because it is violative of due process or denies the equal protection of the laws, there arises a presumption of constitutionality. *Powell v. Pennsylvania,* 127 U.S. 678. "It is a presumption of fact, of the existence of factual conditions supporting the legislation." *Borden's Farm Products Co. v. Baldwin,* 293 U.S. 194, 209. Thus the burden is on the challenger to show that such a state of facts exists as renders the action of the legislature clearly unreasonable or arbitrary. *O'Gorman & Young v. Hartford F. Ins. Co.,* 282 U.S. 251. Thus the petitioner must show that the effects of a strike by public utility employes are such that the legislature's enactment of Chapter 414, Wisconsin Laws of 1947, was clearly unreasonable and arbitrary. In other words, in order for this Court to declare the statute unconstitutional as being violative of the Fourteenth Amendment, petitioner must show that public health and safety would be so minutely affected by a public utility strike that the legislature was acting clearly unreasonably and arbitrarily in providing for compulsory arbitration and in prohibiting strikes. At page 17 some of the calamitous consequences of a public utility strike are pointed out. It is obvious that petitioner cannot meet the test.

Petitioner argues that the Wisconsin law is not confined to situations of actual public danger and peril. It is difficult to conceive of an interruption of an "essential service", as defined by the statute, which would not place the public in great danger and peril. Does petitioner mean to contravene the express finding of the legislature that

> "* * * The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and *creates an emergency* justifying action which adequately protects the general welfare."? Section 111.50 (Emphasis supplied)

Mere opinions of counsel certainly cannot overcome a finding of a legislature, which body is presumed to have investigated the facts with respect to which it promulgates its legislation. The burden is upon petitioner to show that the actual facts are such as to render the action of the legislature clearly unreasonable and arbitrary. *O'Gorman & Young v. Hartford F. Ins. Co.*, 282 U.S. 251. It must meet this burden by introducing evidentiary facts. Obviously mere statements of counsel cannot be considered.

In *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722, the Court said:

> "* * * The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted. * * *" (p. 725)

With respect to the duty of courts in passing upon the issue of due process, this Court in *Nebbia v. New York*, 291 U.S. 502, declared:

"* * * If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.

* * *

"With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. * * *". (p. 537)

Many years ago Edmund Burke, the illustrious friend of the American Colonists, declared:

"Liberty, to be enjoyed, must be limited by law, for law ends where tyranny begins, and the tyranny is the same, be it the tyranny of a monarch, or of a multitude—nay, the tyranny of the multitude may be the greater, since it is multiplied tyranny."

The late Justice Brandeis, one of organized labor's greatest defenders, recognized that as a means of protecting the public a state "may substitute processes of justice for the more primitive method of trial by combat." In a celebrated dissenting opinion in *Duplex Printing Press v. Deering*, 254 U.S. 443, he announced:

"All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands. This is the function of the legislature, which, while limiting individual and group rights of aggression and defense; *may substitute processes of justice for the more*

primitive method of trial by combat." (p. 448) (Emphasis supplied)

Petitioner in the case at bar disagrees with the Brandeis philosophy. It appears to cherish "the more primitive method of trial by combat."

In *New State Ice Co. v. Liebmann,* 285 U.S. 262, the same learned jurist, in a dissenting opinion, declared:

> "It is settled that the police power commonly invoked in aid of health, safety and morals extends equally to the promotion of the public welfare. (p. 304)
>
> * * *
>
> "There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.
>
> * * *
>
> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." (p. 311)

In *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, it was recognized that "powerful labor unions have been organized" with "multitude of members," and as a result thereof they have "acquired a vast power in the presence of which the individual may be helpless." That statement was never more true than it is today when the employes of a public utility elect to strike.

Petitioner contends that public utility employes have a constitutional right to inflict such injuries upon the public as are necessarily incident to a strike by such employes. In short, it is their position that the State of Wisconsin is powerless to enact a valid statute prohibiting them from inflicting such injuries. We submit that the State of Wisconsin has such power.

In commenting upon the absence of any constitutional right to strike, this Court in *International Union v. Wisconsin E. R. Board,* 336 U.S. 245, declared:

> "This Court less than a decade earlier has stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common law nor the Fourteenth Amendment, confers the absolute right to strike.' Dorchy v. Kansas, 272 U.S. 306, 311. Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest. Duplex Co. v. Deering, 254 U.S. 443, 488. This Court had adhered to that view. Thornhill v. Alabama, 310 U.S. 88, 103 (6 L.R.R. Man. 697). The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining * * * ".

B. A legislature clearly has the power to prescribe wages, hours, and working conditions in the public utility industry.

Petitioner contends that the Wisconsin law is in violation of the Due Process Clause of the Fourteenth Amendment because it is in essence an attempt by the legislature to establish wages, hours, and working conditions of the public utility employes. Petitioner relies on *Wolff Packing Co. v. Court of Industrial Relations,* 262 U.S. 522. The state law there in question applied broadly to a great variety of private industries. The plaintiff was a meat packing company. Because of its broad coverage the act was held invalid. However, in *Wilson v. New,* 243 U.S. 332, it was held that such a law was proper when it applied only to a public utility.

To contend that a legislature is powerless to establish wages, hours, and working conditions seems wholly without merit in view of the more recent decisions of this Court in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379; *United States v. Darby,* 312 U.S. 100; *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177; and *Lincoln Union v. Northwest Co.,* 335 U.S. 525. To contend that a legislature is powerless to establish wages, hours, and working conditions is to say that Congress was acting beyond its power when it enacted the Fair Labor Standards Act. 52 Stat. 1060, 29 U.S.C.A. §§201-219. The Act was held valid in *United States v. Darby,* 312 U.S. 100. To follow the logic of petitioner's contention would be to say that states are powerless to regulate public utilities. Does petitioner mean to contend that a state does not have the power to prescribe the wages, hours, and working conditions in public utilities? Is it petitioner's contention that the state's power extends no further than to establish rates of service? If so, clearly such contention is without merit. If a state can prescribe working conditions in private industry, (*West Coast Hotel Co. v. Parrish*) it certainly can prescribe them for the public utility industry, which virtually serves as an agent of the state.

The philosophy of the *Wolff* case upon which petitioner relies has long since been rejected. This Court in *Lincoln Union v. Northwest Co., supra,* said:

> "* * * That the due process clause does not ban legislative power to fix prices, wages and hours as was assumed in the Wolff Case, was settled as to price fixing in the Nebbia and Olsen Cases. That wages and hours can be fixed by law is no longer doubted since West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L.ed. 703, 57 S.Ct. 578, 108 A.L.R. 1330; United States v. Darby, 312 U.S. 100, 125, 85 L.ed 609, 623, 61 SCt. 451, 132 A.L.R. 1430; Phelps Dodge Corp.

v. National Labor Relations Bd., 313 U.S. 177, 187, 85 L.ed. 1271, 1279, 61 S.Ct. 845, 133 A.L.R. 1217:

"This Court beginning at least as early as 1934, when the Nebbia Case was decided, has steadily rejected the due process philosophy enunciated in the Adair-Coppage line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principal that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.

* * *

"Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." (pp. 536-537)

The very fact that petitioner bases its contention upon the *Wolff* decision is indicative of its lack of merit. The principles of the *Wolff* case are no longer a part of our law.

C. To say that a state cannot prohibit strikes which vitally affect the public health and safety is to say that a state is powerless to change its methods of administering justice.

To declare that under the "due process" clause of the Fourteenth Amendment the state is powerless to prohibit strikes in businesses which vitally affect the public interest is equivalent to a declaration that a state has no power to change its methods of administering justice.

To hold that the right to strike in such employment is essential to "due process of law" would be "to deny every

quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." *Hurtado v. California,* 110 U.S. 232. In the above case the Court, in approving a new statutory criminal procedure adopted in California, declared:

> "It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.
>
> "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.
>
> * * *
>
> "There is nothing in *Magna Charta* rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms.
>
> * * *
>
> "In the 14th Amendment, by parity of reason, it (due process of law) refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our

civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. 'The 14th Amendment' as was said by *Mr. Justice* Bradley in *Mo. v. Lewis supra,* 'does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding'." (pp. 237-8)

D. The Wisconsin Act is clear in its terms and its application can be easily understood by reasonable persons.

Petitioner contends that the Wisconsin law violates the Due Process Clause because it is indefinite and vague and requires workingmen to speculate as to what acts it applies. Petitioner asserts more particularly that the workingmen must speculate whether a proposed strike would cause an "interruption of an essential service." Certainly any reasonable person could ascertain whether a proposed strike would cause such an interruption. The statute expressly defines "essential service" to mean "furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state." Section 111.51(2). It does not take much imagination to ascertain whether a strike would interrupt one or more of such services. The legislature could not have selected any clearer terminology.

IV.

THE WISCONSIN LAW IS NOT IN VIOLATION OF THE THIRTEENTH AMENDMENT

A. An individual employe is free to quit his employment at any time.

Petitioner's contention that the Wisconsin law violates the Thirteenth Amendment is answered by the express provisions of the law itself. Section 111.64 provides:

> "Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.
>
> "All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter."

Under the foregoing statute the employe is free to terminate his employment at any moment that he may desire, so long as it is not done pursuant to an agreement with other employes which has as its object the coercion of an employer in respect to a labor dispute. While the literal words of the statute would appear to prohibit all quitting of labor or service which is "done in concert,"

other provisions of the Act—Section 111.50—make it abundantly clear that the legislature did not intend that a quitting in concert, which is not done for the purpose of enforcing a labor demand, should be deemed a violation of the statute. If two or more employes should agree to quit work at the same time for the purpose of attending college or for any other purpose not associated with a labor demand they certainly would not be in violation of the statute.

Involuntary servitude is no more imposed by the legislature through this enactment than it is imposed by the majority of the employes when such employes authorize their union to enter into a contract with an employer under which it is agreed that all employes will refrain from striking, and will resolve their labor disputes by arbitration.

The minority of the employes who may be opposed to arbitration and to a no-strike contractual undertaking, are in no different position than the petitioner in the case at bar. If Chapter 414 imposes involuntary servitude, it must also follow that such union contracts impose involuntary servitude upon the non-assenting minority. Needless to say, there is no involuntary servitude involved in either circumstance. If a state is guilty of inflicting involuntary servitude when it denies public utility employes the right to strike, the federal government must be deemed guilty of the same offense when it denies to its own employes the right to strike. See Section 305 of the Taft-Hartley Act.

New Jersey has a comparable statute requiring compulsory arbitration of labor disputes in public utilities. In *Van Riper v. Traffic Tel. Workers Fed of N. J.*, 61 Atl. 2d 570 (N.J. Ch.), reversed in 61 Atl. 2d 616, on

other grounds, the court answered the contention that the state law imposed involuntary servitude, as follows:

> "What preserves the employe's liberty under the constitution is not collective bargaining but is the right of the individual to refuse to work for the Telephone Company * * *
>
> "The rights secured by the Constitution are secured to individuals and not to classes. The Union is the collective bargaining agent of the 12,000 employes of the Company, under appointment by a majority of the employes in the bargaining unit. In the ordinary course, a committee of the Union agrees with the Company on wages and, I suppose, this agreement is ratified by a majority of the Union members. But in any group so large as this, there must be many who do not want the Union to be their bargaining agent and many others who, while willing to be so represented, are dissatisfied with the stipulated wage scale. The constitutional rights of such individuals are as precious as the rights of the majority. If the argument of the Union were sound, then this minority would be condemned to involuntary servitude when wages were fixed by the collective bargaining process. But I say again, their constitutional right is preserved because they can surrender their employment."

CONCLUSION

Can it be reasonably said the Congress, by the enactment of the Taft-Hartley Act, meant to prevent states from settling labor disputes in public utilities in an orderly manner so as to assure the safety and health of their inhabitants? Or did Congress intend that labor disputes vitally affecting the public interest be settled by "the more primitive method of trial by combat", to use the words of Justice Brandeis in *Duplex Printing Press v.*

Deering, 254 U.S. 443? Is a state to be prohibited from substituting for the right to strike more orderly and just processes for the settlement of labor disputes involving persons rendering essential services to the community? Is a state to stand still and be foreclosed from adopting new processes to adjust itself to the increasing changes and complexities of our swiftly growing social and economic world?

It is a matter of paramount importance that the essential services of public utilities flow constantly and uninterrupted to the consuming public. A state owes an obligation to its citizens to take every step necessary to assure the constant rendition of such services. The Wisconsin legislature acted very reasonably in substituting the arbitration process to settle public utility labor disputes in place of the conventional method of trial by combat. What more reasonable substitute could have been selected? What then is the nature of the petitioner's complaint?

There appears to inhere in the contentions of the petitioner the erroneous assumption that the arbitration board will not decide the issues in a fair and just manner; that notwithstanding such arbitrators are required to take an oath to faithfully perform their duties, they will, as a matter of fact, act in a dishonest and corrupt manner. The truth of the matter is that petitioner does not wish to present its demands involving public utilities to an impartial and unbiased public tribunal which has been established as an arm of the state. It seeks to achieve its demands by coercion. It does not want an equality of bargaining power.

Petitioner proceeds upon the well founded assumption that if it denies or threatens to deny to the public the

actual necessities of life, the public will exert such pressure upon the employer as to compel the employer to accede to the union's demands.

Petitioner's complaints are ill-founded. The arbitration board, which is called upon to make a determination if all else fails, is an agency of the State. The Act provides in part as follows with respect to the arbitrators and conciliators:

> "* * * Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. * * *" Sec. 111.53.

What more assurance could the legislature give than that the arbitration board was to be an impartial, qualified agency? The legislature did its utmost to assure both employers and employes that they would be accorded a fair and just determination.

It must be conceded that a state can prescribe the wages, hours, and working conditions of a public utility. In enacting Chapter 414, Laws of 1947, the Wisconsin legislation in effect said: we will leave the determination of the wages, hours, and working conditions up to the employers and employes on a voluntary basis, but if the parties cannot agree and because of such disagreement service to the public will be interrupted, then the wages, hours, and working conditions shall be determined by the state.

Petitioner in effect is arguing that Congress intended to deprive states of their traditional power to regulate public utilities. Obviously Congress has no such power, and furthermore, it had no such intention.

In conclusion we consider it significant to refer to an opinion of the Michigan Supreme Court.

In *Local 170 v. Gadola*, 322 Mich. 332, 34 N.W. 2d 71, the court held unconstitutional a Michigan statute which provided for compulsory arbitration of labor disputes in the public utility industry. The court's decision was based upon the fact the Michigan statute required a circuit judge to act as chairman of the arbitration board. The court held this was unconstitutional because it was an attempt to confer upon a judicial office nonjudicial powers and duties. On motion for rehearing the court held that no other question should be considered as having been decided by the court. It is significant, however, that in its opinion the court alluded to the fact that ten other states had passed similar statutes, and declared:

> "The merits of compulsory arbitration over collective bargaining and voluntary arbitration are currently the subject of discussion in legislative halls, university classrooms, and the public press." (p. 74)
>
> * * *
>
> "So compulsory arbitration of labor disputes in the field of public utilities and hospitals may, under the police power to safeguard the public interest, be within constitutional limitations, both federal and state; and certainly so where the facts show a 'clear and present danger' to the public interest."
>
> * * *
>
> "Furthermore, it seems no more logical, within proper limits, to fix wages in public utilities by compulsory arbitration than to fix rates." (p. 75)
>
> * * *

"So considered, there is left but little room for the view that, under Federal constitutional limitations, State legislation substituting even compulsory arbitration for economic 'trial by battle' in the case of public utilities and hospitals constitutes an arbitrary and unreasonable interference with the liberty of the individuals concerned or the property rights of employer and employes."

Legal scholars have arrived at the same conclusions as have been expressed in this brief. Professor Clarence M. Updegraff in his article now being published in 36 Iowa Law Review 61, "Compulsory Settlement of Public Utility Disputes", arrives at the following conclusion:

"It will be recognized that since all public utility properties are owned and operated for purposes which entitle the utility companies to take lands of private owners for their use without violating the 'due process' clause, the utility is in the most complete sense discharging a 'public service.' It is analogous to a branch or department of the state government. Virtually all of the businesses now referred to as public utilities are in one part of the world or another, commonly owned and operated by sovereign states, so that in a very real and correct sense it may be said that the public utilities are to be identified with government agencies for which they are in a sense, substituted. Since they have become monopolies because of their duty, like that of the government, to serve all at reasonable rates, they have reached a point of development where it becomes necessary to sustain their unfailing operation just as government itself is sustained. This is to secure protection of the health, public safety, and general welfare of the population or general public. Indeed, the public health, morals, safety, and general welfare (so zealously guarded by the sovereign police power) would be much more quickly impaired by discontinuance of certain public utility services than

by temporary suspension of many governmental agencies. * * * " (p. 64)

Professor Updegraff further concludes that situation of the public employe is analogous to those performing services "in the Army, Navy, police forces, fire fighting forces, and various other public and quasi-public activities. All the arguments used to sustain the conclusion that strikes against the government may be prohibited operate in the same measure to sustain the contention that strikes against public utilities may be regulated and restricted." (p. 69)

For the foregoing reasons, the decision of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted

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